Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-115
Telecommunications Act of 1996	)	
	)	
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other Customer Information	)	
	)	
Implementation of the Non-Accounting	)	CC Docket No. 96-149
Safeguards of Sections 271 and 272 of the	)	
Communications Act of 1934, As Amended	)	

REPLY COMMENTS OF EXCEL COMMUNICATIONS, INC.

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SUMMARY

Excel Communications, Inc. provides these reply comments to refute arguments made by the Bell Operating Companies ("BOCs") that the Commission is powerless to prohibit the BOCs from discriminating in favor of their own affiliates in the provision of customer proprietary network information ("CPNI"). On the contrary, CPNI is clearly a type of "information," and so Section 272(c)(1), which mandates non-discriminatory access to information, must apply to CPNI unless the BOCs establish a constitutional or statutory basis for an exemption.

Application of Section 272 to CPNI is constitutional because it is narrowly tailored to advance the government's substantial interest in preserving competition, and no more narrowly tailored alternatives have been suggested that would still effectuate the purpose of Section 272.

Moreover, the nondiscrimination requirement of Section 272(c)(1) is not trumped by the CPNI rules of Section 222 or the joint marketing provisions of Section 272(g). Each of these sections, including Section 272(c)(1), was adopted for a discrete, important purpose, and the Commission is required to enforce fully each section. Section 272(g) permits BOCs to decline requests by competitors to enter into joint marketing arrangements that they share with their affiliates, but it does not relieve the BOCs of their obligation to provide nondiscriminatory access to the types of CPNI *underlying* these marketing efforts.

As demonstrated in these reply comments, the BOCs fail to justify their request for a license to discriminate in favor of their affiliates. Therefore, Excel urges the Commission to hold that, under Section 272, BOCs must provide nondiscriminatory access to any type of CPNI that the BOCs provide to or use on behalf of their own affiliates.

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REPLY COMMENTS OF EXCEL COMMUNICATIONS, INC.

Excel Communications, Inc. ("Excel"), pursuant to the Commission's Second Further Notice of Proposed Rulemaking issued in the above-captioned proceedings,[1] respectfully submits its reply comments to refute the arguments made by the Bell Operating Companies ("BOCs") that the Commission is powerless to prohibit them from discriminating in favor of their own affiliates in the provision of customer proprietary network information ("CPNI"). On the contrary, the plain language of Section 272 of the Telecommunications Act of 1996 (the "Act") and the evidence in the record demonstrate clearly that the Commission has the authority – indeed, the responsibility – to reverse the Section 272 exemption granted to the BOCs in the

[1] *Implementation of the Telecommunications Act of 1996, Telecommunications Carriers' Use of Customer Proprietary Network Information, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended,* CC Docket Nos. 96-115 and 96-149, Clarification Order and Second Further Notice of Proposed Rulemaking, FCC 01-247 (rel. Sept. 7, 2001).

now-vacated *CPNI Order*[2] and instead to require that BOCs provide nondiscriminatory access to any type of CPNI that a BOC provides to or uses on behalf of its own affiliates.

The market protections of Section 272 are crucial to competitive carriers such as Excel that are focused primarily on the interexchange market, particularly the residential market. Congress adopted Section 272 to ensure that the competitive market would not be overrun in the first years of the BOCs' interLATA market entry as a result of the advantages held by the BOCs from their control of bottleneck facilities and their vast store of customer information built up during their monopoly reign. Section 272 is designed to prevent the BOCs from unduly leveraging these advantages derived from their monopoly into an insurmountable advantage in other, heretofore competitive markets.

Although the focus of these reply comments is on the application of Section 272 to CPNI, Excel provides its views from the perspective that the Commission should adopt an opt-out approach for determining customer approval for a carrier's use of CPNI under Section 222(c)(1). Excel agrees with the vast majority of commenters that a mandatory opt-in regime could not withstand First Amendment scrutiny under the standards set forth by the Tenth Circuit in *U S WEST v. FCC*.[3] Opt-out, by contrast, is narrowly tailored to accomplish Congress' objectives relating to CPNI, and similar models have proved successful in other areas of consumer privacy laws governing the use of information at least as sensitive as CPNI.[4]

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[2] *Implementation of the Telecommunications Act of 1996, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended,* CC Docket Nos. 96-115 and 96-149, Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd. 8061, 8172, ¶ 154 (1998) ("*CPNI Order*").

[3] *US WEST, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999).

[4] *See* AT&T Comments at 15-16, Alltel Comments at 5-6, Nextel Comments at 6-7.

In any case, regardless of the form of approval selected in this proceeding, the Commission must reverse its earlier finding that BOCs are permitted to discriminate in favor of their own affiliates in the provision of CPNI. Section 272(c)(1) plainly requires BOCs to offer nondiscriminatory access to information. As several commenters make clear, the only reasonable and permissible statutory interpretation of "information" necessarily includes CPNI.[5] In fact, the BOCs do not seriously contest that CPNI is by definition a type of information. Therefore, the presumption in this case must be that Section 272(c)(1) applies to the BOCs' provision of CPNI to their affiliates. The BOCs can defeat this presumption only if they demonstrate either that (1) such a requirement would be unconstitutional or (2) that Congress intended that it be superceded by some other statutory provision. In these reply comments, Excel demonstrates that each of the BOCs' constitutional and statutory arguments fail to justify an exemption from the clear statutory requirement under Section 272 that BOCs offer nondiscriminatory access to any type of CPNI that it provides to or uses on behalf of its own affiliates.

I. APPLICATION OF SECTION 272 TO THE BOCs' USE OF CPNI DOES NOT VIOLATE THE FIRST AMENDMENT

The BOCs attempt to argue that application of Section 272 to their use of CPNI would violate the First Amendment and the Tenth Circuit's decision. Remarkably, however, the BOC comments lack any explanation of what might be constitutionally distinguishable between a general opt-out rule, which the BOCs acknowledge is constitutional, and application of Section 272 to CPNI rules *using the very same opt-out procedures*. Under opt-out rules, the additional burden that would be imposed on BOCs is miniscule. More importantly, no party has suggested

[5] *See, e.g.,* ASCENT Comments at 4, AT&T Comments at 13-14.

a more narrowly tailored alternative that would still effectuate Congress' intent in Section 272 to prevent anticompetitive discrimination by a BOC in the provision of information.

A. The BOCs' First Amendment "Analysis" Lacks Substance

Beyond blind citation to the *Central Hudson* standard, the BOCs' First Amendment arguments against application of Section 272 are barely detectable.[6] Only SBC offered any specific arguments in support of the position that application of Section 272 would violate the First Amendment.

SBC's "first and foremost" argument is that, in its words, "Congress did not require the Commission to apply section 272 to a BOC's sharing of CPNI with its section 272 affiliate."[7] What is required under Section 272 is, of course, the very question before the Commission. If the Commission concludes that CPNI is not "information," then there is no need to consider Section 272 in this proceeding. If, on the other hand, the Commission finds – as numerous comments and the plain language of Section 272 demonstrate that it should – that CPNI is "information" for purposes of Section 272, then it is clear that Congress requires the Commission to apply Section 272 to a BOC's sharing of CPNI with its affiliates. Either way, SBC's self-serving conclusory statement adds nothing to the constitutional analysis of this issue.

Second, SBC asserts that "the Commission would be hard-pressed to demonstrate that there is a substantial government interest" in applying Section 272 to CPNI.[8] On the contrary, the primary purpose of Section 272 is to advance the public's *very substantial* interest in protecting the market from anticompetitive leveraging by the BOCs of their dominant position in

[6] BellSouth and Verizon do not raise any constitutional objection to application of Section 272.
[7] SBC Comments at 22.
[8] SBC Comments at 22-23.

the local exchange market.[9] No other purpose for Section 272 has been suggested, and Congress clearly attached high importance to this government objective by adopting the Section 272 requirements as an integral part of the 1996 Act. Preservation of a free, fair and competitive market is a substantial public interest that has justified other government regulations on commercial speech, especially in regulated industries,[10] and it is more than sufficient to justify narrowly tailored regulations that limit the BOCs' ability to undermine competition for interexchange and information services.

SBC's third and final constitutional argument is that "the Commission likely could not demonstrate proper tailoring because an obvious, substantially less restrictive alternative – opt-out – exists."[11] SBC's constitutional argument therefore appears to be limited to an attack on application of Section 272 where *opt-in* regulations are in effect. Clearly, opt-out is not an alternative to the application of Section 272, and in fact Excel urges the Commission to both adopt the opt-out model and apply Section 272 obligations to CPNI. As demonstrated below, application of Section 272 obligations with adoption of an opt-out model would be narrowly tailored and is necessary to advance the substantial objectives of Section 272.

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[9] *See Implementation of the Telecommunications Act of 1996: Accounting Safeguards of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd. 17539, ¶¶ 2-3 (1996); see also *CPNI Order* at ¶ 168 ("section 272 is intended to ensure that BOCs do not give their affiliates a competitive advantage.")

[10] Courts have upheld restrictions that serve to advance the government's interests in its regulations of market activities where the government is engaged in extensive regulation, such as securities, antitrust, and transportation, and have extended wider latitude to agency determinations regarding the nature and level of the government's interest in these fields. *See, e.g., NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 912 (1982) (listing examples); *see also S.E.C. v. Wall Street Pub. Institute, Inc*., 851 F.2d 365, 373 (D.C.Cir.1988) ("Under the commercial speech doctrine, a court judging whether a particular regulation affecting speech is constitutional must determine, among other issues, 'whether the asserted governmental interest is substantial.' (quoting *Central Hudson*, 447 U.S. at 564). Here, however, we do not think it necessary for us to inquire, as we would if only commercial speech were involved, whether the government's specific regulatory objective--disclosure of consideration--is constitutionally permissible. In areas of extensive federal regulation--like securities dealing--we do not believe the Constitution requires the judiciary to weigh the relative merits of particular regulatory objectives that impinge upon communications occurring within the umbrella of an overall regulatory scheme.")

[11] SBC Comments at 23.

B. The Opt-Out Model is Narrowly Tailored to Meet Section 272 Objectives

The BOCs recognize that the Commission may lawfully implement a minimum opt-out standard for ascertaining customer approval under Section 222(c)(1).[12] The BOCs thereby acknowledge that opt-out is tailored sufficiently narrow with respect to Section 222 to pass constitutional muster. Likewise, any perceived incremental "burden" on BOC speech imposed by adherence to Section 272 is insignificant and does not result in an unconstitutional restriction on free speech.

The BOCs suggest that application of Section 272's nondiscrimination requirement is not narrowly tailored to advance legitimate government objectives because, according to their allegations, it would inflict a tremendous burden on their ability to use CPNI for joint marketing with their 272 affiliates. SBC warns that "such a requirement would likely prove so burdensome that a BOC might choose not to disclose CPNI rather than be encumbered by a nondiscrimination obligation."[13] BellSouth describes the burden of nondiscrimination as "insurmountable."[14] However, the only additional burden beyond what other carriers using opt-out would experience is that a BOC opt-out notice would simply need to include notice to the customer that CPNI could be disclosed to the BOC's affiliates and other certificated carriers.[15]

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[12] Verizon Comments at 13 (the Commission's interim opt-out rules represent "reasonable requirements"); Qwest Comments at 16 ("an opt-out CPNI approval model is in the public interest"); and SBC Comments at 9-14 (touting advantages of opt-out approach).

[13] SBC Comments at 19.

[14] BellSouth Comments at 9-10.

[15] A Commission requirement that the BOC obtain customer approval each time that a competing carrier requested access to CPNI, or became certified as a new carrier eligible to request access, might arguably create a burden on BOCs that would not be narrowly tailored to meet the objectives of Sections 222 and 272. Approval under Section 222(c)(1) can reasonably be inferred from an opt-out notice that informs the customer of the nature of the third-parties to which CPNI could be disclosed. This form of opt-out approval has been adopted by the Federal Trade Commission for bank disclosures of highly sensitive consumer financial information and is sufficient to protect consumers' interests in CPNI. *See* AT&T Comments at 15-16, Alltel Comments at 5-6, Nextel Comments at 6-7.

Even if this "additional burden" had a material effect on the BOCs' First Amendment rights – and there is no credible evidence in the record that it would – nothing less could be required that would still accomplish the objectives of Section 272. Had the BOCs genuinely attempted a "proper tailoring" analysis, they would have needed to compare the burdens imposed by the contemplated regulation vis-à-vis an alternative regulation that would still accomplish the government's objectives. Not surprisingly, the BOCs offer no alternative that is arguably more narrowly tailored that would satisfy the competitive and nondiscrimination objectives of Section 272. Narrowly-tailored doesn't necessarily mean a small suit; it means only that the fit must not be looser than necessary. No party has suggested any alternative regulatory solution that would adequately protect and promote the important competitive objectives of Section 272. The BOCs' arguments against application of Section 272 based upon the First Amendment and *Central Hudson* therefore must fail.

II. THE BOCs FAIL TO ESTABLISH A STATUTORY BASIS FOR AN EXEMPTION FROM THE NONDISCRIMINATION REQUIREMENTS OF SECTION 272

The BOCs next argue that the nondiscrimination requirement of Section 272(c)(1) is trumped by "more specific" Congressional instructions provided in three other statutory provisions in Sections 222(c)(1), 222(c)(2), and 272(g). These arguments fail to offer any compelling basis for an exemption and would only serve to undermine the important public interest objectives of Section 272.

A. Section 222(c)(1) Does Not "Trump" Section 272

The BOCs argue that the Commission should disregard Section 272 with respect to CPNI because it should hold that Section 222 trumps Section 272.[16] However, Congress did not authorize the Commission to choose which statutes to enforce, picking one statute over another. These statutory provisions are not at odds, and so the Commission is required to give force to both.

The BOCs' attempt to force a choice between the two statutory provisions is based upon their argument that Section 222 is "more specific" than Section 272 with respect to CPNI. For example, Qwest reasons that the "more specific CPNI provision, Section 222, should control the CPNI customer approval process with respect to both the BOC and the Section 272 affiliate, as well as how CPNI is used or shared after such approval has been secured."[17] This argument might have merit if Sections 222 and 272 were adopted for identical reasons. However, these statutes were adopted to advance separate, important government interests, and each statute is specific with respect to the interest the statute is meant to protect. Section 222 is designed to protect the privacy of carrier and consumer information and to promote competition. Section 272, by contrast, was adopted for the very specific purpose of curbing the ability of the BOCs to leverage their market power in the local exchange market into new monopolies in other markets. Section 222 therefore offers more detail regarding the generic CPNI rules applicable to all carriers, while Section 272 provides greater specificity as to the rules applicable to the sharing of information between BOC affiliates. The simple fact that both statutes touch on a common subject – the use and disclosure of information – does not mean that Congress possessed only a

[16] Ironically, the BOCs simultaneously disparage the idea that Section 272 might "trump" Section 222. *See* Verizon Comments at 7.

single purpose with respect to this subject, and the Commission should therefore not presume that Congress' objectives would be satisfied by implementing only one of these sections.

For example, Section 251 provides greater specificity than Section 272 regarding the details of carriers' obligations to permit interconnection of facilities, but it cannot reasonably be suggested that Section 251 trumps a BOC's Section 272 obligation to provide nondiscriminatory access to facilities. Section 251 and 272 were adopted for different reasons, and both must be given effect.

Furthermore, there is no basis to determine that Section 222 is "more specific" than Section 272. This contention by the BOCs is akin to an argument that that the description "a red delicious apple purchased at a store" is more specific than "an orange bought yesterday at Sam's Grocery." These descriptions are simply more specific about a certain subject, provided, perhaps in response to different questions, such as "what kind of apple is this?" or "where did this orange come from?" The BOCs' comparison between the congressional intent behind Sections 222 and 272 is similarly an apples-to-oranges comparison that ignores the fact that the Commission can and must enforce both statutory provisions and thereby promote the privacy and competition interests of Section 222 *and* the antidiscrimination interests of Section 272.

Full enforcement of Section 272 would in no way undermine the Congressional objective of Section 222(c)(1) to give consumers control over the use and disclosure of their CPNI. Using whatever models of approval are permitted under the Commission's rules, the BOC may seek approval from its customers to disclose CPNI to its 272 affiliates and to other certified telecommunications carriers. If a customer approves such use and disclosure, then the customer control objectives of Section 222 are met, and no further approval should be necessary when a

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[17] Qwest Comments at 26.

CLEC or IXC requests access to a type of CPNI made available to a BOC affiliate.[18] If the customer rejects such use of his CPNI, that is a decision Section 222 empowers him to make. If a consumer is truly intent that his CPNI be made available only to a BOC affiliate – a preference not likely or readily apparent anywhere in the record – he can reject the opt-out notice and then make an affirmative written request for such disclosure under Section 222(c)(2).

Section 222(c) vests control with the consumer, not the carrier, and the BOCs therefore are not entitled to argue that application of Section 272 would deprive them of "their" rights under Section 222(c)(1). Therefore, there is no conflict in the statutory purposes of Sections 222 and 272, and the Commission should reject the BOCs' arguments that it is required to determine that Section 222 trumps the nondiscrimination provisions of Section 272.

B. Sharing CPNI With Other Affiliated and Non-Affiliated Carriers Does Not Violate Section 222(c)(2).

Verizon argues that the provision of nondiscriminatory access to competing carriers would violate Section 222(c)(2), which, Verizon says, "prohibits such disclosure to third parties *except upon* 'affirmative written request by the customer.'"[19] Verizon has completely misread Section 222(c)(2), which is entirely separate from the carrier restrictions of Section 222(c)(1) and is instead designed to ensure that the *consumer* ultimately has the right to obtain his own CPNI, much as consumers have the right to demand their medical files, credit reports, and legal case files.[20] Section 222(c)(2) contains no prohibitions on the use or disclosure of CPNI, acts that are instead governed by Section 222(c)(1). The statute creates only an affirmative duty to disclose CPNI upon written request. Verizon has simply added the words "except upon" to its

[18] See *supra* note 15.
[19] Verizon Comments at 10 (emphasis added).

interpretation of the statute to attempt to avoid its Section 272 obligations. Furthermore, taken to its logical conclusion, Verizon's argument would preclude it from sharing CPNI with its own affiliates – which, because they must "operate independently,"[21] are also third parties – without first obtaining affirmative written permission from the customer.

The Commission has previously recognized that, notwithstanding Section 222(c)(2), a carrier may effectively be required to disclose CPNI to another carrier in order to discharge its obligations under another section of the Act. In the *CPNI Order*, the Commission found that "although an incumbent carrier is not required to disclose CPNI pursuant to . . . section 222(c)(2) absent an affirmative written request, local exchange carriers may need to disclose a customer's service record upon the oral approval of the customer to a competing carrier prior to its commencement of service as part of the LEC's obligations under sections 251(c)(3) and (c)(4)."[22] In other words, third parties must have written approval to force an otherwise unwilling carrier to disclose CPNI, but written approval is not required if a carrier wants, or pursuant to a legal obligation needs, to disclose CPNI to a third party; in such cases, only "approval" is required.

The only way that Verizon can violate Section 222(c)(2) is by refusing to honor a written request from a customer to disclose CPNI. Verizon's reliance on Section 222(c)(2) as a basis to excuse it from its Section 272 obligations is therefore without merit and should be rejected.

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[20] Section 222(c)(2) provides as follows: "Disclosure on Request by Customers. – A telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer."
[21] 47 U.S.C. § 272(b)(1).
[22] *CPNI Order* at ¶ 84.

C. The Joint Marketing Provisions of Section 272(g) Permit Exclusive Access to Marketing Media, Not to Information.

Several BOCs argue that, even if CPNI is deemed information for the purposes of Section 272, they are still permitted to discriminate in favor of their own affiliates in the provision of CPNI pursuant to the joint marketing provision set forth in Section 272(g). Section 272(g) allows a BOC to offer to its affiliate marketing options not made available to others, such as the use of common websites and advertising. However, it cannot be read as a blank check for unfettered exclusive access to key information. The joint marketing provision means only that a BOC is not required to offer to non-affiliates the same joint marketing programs that it offers to its affiliates, such as joint telemarketing or mail campaigns. Section 272(c)(1) still requires that the BOC provide nondiscriminatory access to the information *underlying* these marketing efforts, so that the unaffiliated companies may conduct their own marketing on a footing that is at least remotely equal to the BOC affiliates.

If Section 272(g) overrode all nondiscrimination requirements with respect to access to information, BOCs could reserve for their affiliates not only CPNI but all kinds of essential information, resulting in an exception that would swallow the rule. For example, a BOC could provide exclusive information to its enhanced services affiliates regarding the locations of broadband facilities expansions, so that the affiliate could get a jump-start on marketing new broadband options ahead of all of its competitors. Virtually every discriminatory and anticompetitive provision of information could be justified as part of a marketing campaign. Furthermore, the BOCs' arguments, if adopted, could be used by BOCs to justify not just discrimination in the provision of information, but also of any goods, services or facilities that might facilitate a successful joint marketing campaign. The nearly limitless potential for abuse

would leave a gaping hole in the effectiveness of Section 272 that clearly is not necessary to preserve the BOCs' rights under Section 272(g) to conduct joint marketing. The Commission should therefore reject the BOCs' mischaracterization of Section 272(g) as a Trojan Horse that is their vehicle for a sweeping exemption from the requirements of Section 272(c)(1).

III. OTHER ARGUMENTS OFFERED BY SBC AND VERIZON FAIL

Finally, SBC and Verizon argue that their use of CPNI would not trigger Section 272, even if Section 272 applies to CPNI.

A. Section 272 Applies whether a BOC Discloses Information to the Affiliate or Uses it on Behalf of the Affiliate.

SBC maintains, implausibly, that it does not "provide" CPNI to its affiliates, but instead only "uses" the information on their behalf. SBC suggests that "when a BOC uses CPNI to market the services of a Section 272 affiliate, it does not actually provide the CPNI to that affiliate," and that, "consequently, the non-discrimination obligations of Section 272 are not triggered."[23] SBC's highly semantic argument begs the question of what else a BOC might do "on behalf of" an affiliate in order to avoid Section 272 obligations. SBC's characterization of its spoon-fed affiliate is hardly characteristic of an entity that must, according to Section 272(b)(1), "operate independently" of the BOC. In any case, whether the CPNI is used for or used by the BOC affiliate is immaterial, as the statute applies *both* to "provision" and "procurement" of information. Procurement of information includes the collection and use of information on behalf of the affiliate. Even BellSouth has acknowledged that "[i]t matters not under Section 272(g)(3) whether the permitted marketing activity under Section 272(g)(2) is 'for

[23] SBC Comments at 23.

or on behalf of the affiliate.'"[24] More importantly, the D.C. Circuit has determined that ILECs may not manipulate affiliate structures in order to circumvent the procompetitive requirements of the Telecommunications Act,[25] and the Commission should likewise refuse to sanction SBC's evasive efforts here.

B. The BOCs' Pre-Entry Market Share in the interLATA Market is Not a Relevant Consideration for Application of Section 272.

In what must be a last-ditch attempt to avoid Section 272's nondiscrimination obligations, Verizon argues, incredibly, that "there is no valid policy reason for applying a more stringent CPNI rule" on BOCs because the BOCs are "entering the [interLATA interexchange] market with a zero market share and will be competing against a series of large well established carriers."[26] Verizon of course has completely mischaracterized the purpose of Section 272, which was adopted to curb the potential for BOCs to exploit their enormous market share in the *local services* market to their undue advantage in other markets. Verizon's current market share for interLATA services is irrelevant. As Verizon itself recognizes, Section 272 was adopted by Congress at a time when the BOCs' share of this market was zero. Therefore, it is clearly not the appropriate measure to determine whether Section 272 applies.

It is, of course, the BOCs' enormous market share in the local exchange market that necessitates application of Section 272's nondiscrimination rules to their use of CPNI in ways designed to garner their affiliates greater market share in other markets. From decades of monopoly service, the BOCs possess CPNI on virtually every household and business in their regions. In enacting Section 272, Congress determined that the BOCs should not be permitted

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[24] Bell South Comments, Attachment at 11.
[25] *Assn. of Comm. Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. January 9, 2001).
[26] Verizon Comments at 11 (internal quotations and citations omitted).

immediately to leverage the advantages derived from their monopoly heritage into an advantage in other emerging competitive markets. It is this Congressional determination – and nothing more – that Excel urges the Commission to heed by holding that BOCs must provide nondiscriminatory access to any type of CPNI that the BOC provides to or uses on behalf of its own affiliates.

IV. CONCLUSION

On every count, the BOCs have failed to justify an exemption from the clear statutory requirements of Section 272(c)(1) with respect to CPNI. No more narrowly tailored rule is available that would effectuate Congress' crucial legislative objectives in Section 272 to curb the ability of the BOCs to extend their domination of the local markets into other fields. Therefore, Excel urges the Commission to hold that under Section 272 BOCs must provide nondiscriminatory access to any type of CPNI that the BOC provides to or uses on behalf of its own affiliates.

Respectfully submitted,

/s/

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